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In the Supreme Court of the United States

OCTOBER TERM, 1957

NO. 96

TOM ESKRIDGE, *Petitioner,*

v.

WASHINGTON STATE BOARD OF PRISON TERMS AND PAROLES, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR CERTIORARI FILED NOVEMBER 7, 1956

CERTIORARI GRANTED APRIL 1, 1957

BRIEF OF RESPONDENT

JOHN J. O'CONNELL,
Attorney General,

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Office and Post Office Address: Temple of Justice, Olympia, Wash.

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BRIEF OF RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the constitutions and statutes cited by petitioner, the respondent will rely upon the Tenth Amendment to the Constitution of the United States, which reads as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the

states, are reserved to the states respectively, or to the people."

and upon Act of June 25, 1948, chapter 646, § 1, 62 Stat. 967, 28 U. S. C. A., § 2254, which reads as follows:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

QUESTIONS PRESENTED

The question presented by petitioner assumes too much (Br. 5). Assuming, without admitting, that petitioner was entitled to a stenographic transcript at public expense, the question remains whether he can raise this point now. The questions, then, are:

(1) Is the decision in *Griffin v. Illinois*, 351 U. S. 12, to be given retroactive application?

(2) Should *Griffin v. Illinois* be reconsidered?

(3) Was it possible for the petitioner to perfect his appeal without submitting a stenographic

transcript, and, if so, was he entitled to financial assistance and judicial direction in so doing?

(4) Assuming, without admitting, that the question of the right to counsel upon appeal is before this court, is an indigent defendant entitled to counsel at public expense upon his appeal from a criminal conviction (a) at all, and (b) where he elects to act *pro se*?

STATEMENT

Petitioner's statement appears to be accurate. However, we are surprised that he claims the right to counsel upon his appeal from his criminal conviction. No such claim was advanced in the petition for certiorari here, or at all in the court below. Moreover, certain facts pertaining to this claim are significant:

Prior to the trial, petitioner called in the law firm of Donovan & Donovan (Affidavit of A. J. Donovan, R. 60-61). He told the attorneys he wanted a speedy trial; that ten days would suffice within which to prepare (ibid. R. 60). When his efforts to secure funds failed, he asked the law firm to secure a court appointment, which it did (ibid. R. 60). He thereafter *refused to cooperate* with his attorneys (ibid. R. 61). Moreover, he suggested only *two* Spokane witnesses and *one* Portland witness, no others (ibid. R. 61). The attorneys interviewed the Spokane witnesses to no avail, and learned that the Portland witness could be of no assistance (ibid. R. 61).

After the trial, petitioner complained that his attorneys had *refused* to call a certain witness to prove "perjury" on the part of a certain state witness (Letter, petitioner to trial judge, 1/2/36, R. 46-47); and that they had failed to call various witnesses from Spokane, Seattle, and Walla Walla (ibid. R. 47). He criticized his counsel for admitting upon the argument that he had been in the possession of a certain automobile (presumably a judicious admission) (ibid. R. 47). He asked for new counsel to argue the motion for a new trial, upon the ground his attorneys had failed to consult him concerning that motion (Affidavit in Support of Petition for Writ of Mandate, 4 14 36, R. 70-71); and thereafter his counsel withdrew *at his request* (R. 77). *He then decided to act in his own behalf* (Petition for Writ of Mandate, R. 69); and informed the Supreme Court of the State of Washington that he would act *pro se* (R. 67, last paragraph).

There is not a word in the record to suggest that he even desired counsel on appeal, let alone that he asked for it. On the contrary, he was evidently tired of lawyers and did not want one.

Nowhere in the record does the petitioner proclaim his innocence.

SUMMARY OF ARGUMENT

The decision in *Griffin v. Illinois* should be limited to a prospective application. Petitioners who fail to exhaust their state remedies in direct attack upon their judgments of conviction have no standing to seek review here. An application for writ of certiorari out of this court to review the judgment affirming the conviction is a part of the state remedy. The petitioner in this case did not avail himself of this remedy in 1936 although he was able to do so.

The decision in *Griffin v. Illinois* should be reconsidered. It is to be presumed that a convicted defendant has had a fair trial. The burden is upon him to perfect his appeal and to establish error. The presentation of a satisfactory record of the proceedings below constitutes the preparation of his case for review. An exorbitant filing fee is distinguishable from the expenses of preparing a reasonable record of the trial. The Anglo-American tradition has never required the state to defray expenses of preparation for trial; and there is less reason to require it to stand the expenses of appeal. The sense of the people concerning the basic elements of fairness at the time of the adoption of the Fourteenth Amendment did not include the relief requested by the petitioner. The costs of appeal may be prohibitively burdensome to many who are unable to take a pauper's oath. The decision in *Griffin v. Illinois* should be limited to cases where the state imposes an unreasonable requirement for the perfecting of an appeal.

It was assumed for the purposes of decision in *Griffin v. Illinois* that the petitioners could not have secured an adequate review without a stenographic transcript of the evidence. The majority, nevertheless, held that should a transcript prove unnecessary upon remand the state would not be required to purchase one. The law in Washington, established by an unbroken line of authorities since the turn of the century, establishes that a transcript is *never required* as a prerequisite to an adequate appeal. Consequently, the provision of the Washington statute authorizing the trial judge to furnish a transcript at public expense is immaterial to this case. Failure to provide the transcript deprived the petitioner of no constitutional right.

Petitioner cannot raise the question of counsel because he has not raised this point in his petition for certiorari or in the jurisdictional statement. At all events, he waived any right he may have had by dismissing his trial counsel and electing to proceed alone. His ability is demonstrated by the records herein and by the petition for certiorari on file in this case, which he prepared *pro se*. We therefore do not reach the question as to whether a defendant is entitled under any other circumstances to free counsel on appeal from a state conviction. The nature and history of appellate review dispense, however, with any such constitutional requirement.

ARGUMENT

THE DECISION IN GRIFFIN V. ILLINOIS SHOULD BE LIMITED TO A PROSPECTIVE APPLICATION

The doctrine should be limited in scope to petitioners here on certiorari from judgments affirming their convictions, or to petitioners who have previously exhausted their remedy of direct attack upon the judgment of conviction.

The sole question presented by petitioner is whether he is entitled to a free transcript now, of the record that was made in 1935. The petition for certiorari states the question as follows:

> "Is the trial Court's discretionary denial of the indigent defendant's application for the Trial Transcript a denial of the said defendant's constitutional right to appeal as is indicated by the petition for a Writ of Habeas Corpus (Exhibit #2) filed in the Supreme Court of the State of Washington? There is involved here petitioner's rights under Article I, Section 22, 10th Amendment Supplement (Exhibit #10) of the Constitution of the State of Washington; Section 1 of the Fourteenth Amendment of the Constitution of the United States; and by the recent ruling of this Honorable Court in the case of Judson Griffin and James Crenshaw v. The People of the State of Illinois, No. 95—October Term, 1955. The Supreme Court of the State of Washington was in error in not holding that petitioner was entitled to the writ or to a hearing on the basis of the allegations in the petition hereto attached (Exhibit #2)."

In his petition for writ of habeas corpus, the petitioner alleged certain trial and pre-trial errors *in*

support of his request for a transcript. But he nowhere requests habeas corpus on any ground *except* refusal to furnish a transcript (R. 6-14). Consequently, he cannot raise the question of constitutional error at the trial, upon this proceeding. Rule of Supreme Court 40(2). There is no question here, therefore, of the regularity of any of the proceedings leading to judgment. The judgment is presumed to have been valid. *Ventress et al. v. Smith*, 10 Pet. (U. S.) 161, 9 L. ed. 382; *Bechtel v. U. S.*, 101 U. S. 597; see also generally, 3 Am. Jur., Appeal and Error, §§ 924, 925.

This court can hardly grant the relief requested, i.e., order a free transcript at the expense of Spokane County or of the State of Washington (Br. 49). In *Griffin v. Illinois*, petitioner came to this court by way of a direct attack upon the judgment, pursuant to the Illinois Post-Conviction Hearing Act. Here, he asks habeas corpus. It would seem that the relief, if any, must consist of an order to release the petitioner, conditioned upon the furnishing of a transcript.

Habeas corpus is not possible where the petitioner did not exhaust his remedies in a direct attack upon the judgment, except where the claim of constitutional error inhered in a matter outside the record, e.g., mob domination, etc. Where claim of error shows upon the record, the petitioner *must exhaust his remedies in the state court in a direct attack upon the judgment*, or be forever barred. *Brown v. Allen*,

344 U. S. 443; *Sunal v. Large*, 332 U. S. 174; *Goto v. Lane*, 265 U. S. 393. See also *Ex Parte Hawk*, 321 U. S. 114, and *Darr v. Burford*, 339 U. S. 200, concerning the right to a writ in federal court. The exhaustion of state remedies includes an application to this court for certiorari. *Darr v. Burford*, 339 U. S. 200, *supra* (construing 28 U. S. C. A., § 2254, set out verbatim, *supra*, page 1).

In *Goto v. Lane*, 265 U. S. 393, *supra*, the appellants failed to perfect an appeal to the Supreme Court of the Territory of Hawaii. They sought instead a review of exceptions, which review was decided adversely to them. Having failed to appeal to the Supreme Court of Hawaii, however, writ of error to this court did not lie. They then sought habeas corpus out of the District Court for Hawaii. That court denied the application, and this court affirmed upon the ground that having failed to pursue their direct attack upon the judgment *all the way to this court*, they had failed to exhaust their remedies against the judgment. The court said (265 U. S., page 402):

> "* * * And, if the petitioners permitted the time within which a review on writ of error might be obtained to elapse and thereby lost the opportunity for such a review, that gave no right to resort to *habeas corpus* as a substitute. * * *"

In *Brown v. Allen*, 344 U. S. 443, *supra* (Case No. 20 therein), petitioners had incurred the death penalty. They claimed to have been tried by a jury

from which members of their race had been systematically excluded. They served their statement of the case on appeal to the Supreme Court of the State of North Carolina *one day late.* (344 U. S., pages 484-485.) Although the full trial record was before that court, it refused to consider the appeal on its merits. Ibid. They then applied to this court for certiorari to review the state supreme court's refusal to consider their appeal on the merits. (344 U. S., page 446.) This petition was denied. They then applied to the district court for a writ of habeas corpus, which was denied. The circuit court affirmed, and this court granted certiorari. This court then affirmed the district court upon the ground the petitioners had failed to exhaust their remedies of appeal to the supreme court of the state, notwithstanding the fact that the remedy was no longer available to them. The court said (344 U. S., pages 485-486):

> "Of course, federal habeas corpus is allowed where time has expired without appeal when the prisoner is detained without opportunity to appeal because of lack of counsel, incapacity, or some interference by officials. Also, this Court will review state habeas corpus proceedings even though no appeal was taken, if the state treated habeas corpus as permissible. Federal habeas corpus is available following our refusal to review such state habeas corpus proceedings. Failure to appeal is much like a failure to raise a known and existing question of unconstitutional proceeding or action prior to conviction or commitment. *Such failure, of course, bars*

subsequent objection to conviction on those grounds." (Emphasis supplied.)①

Although petitioner herein did not have counsel upon the appeal, it is to be remembered that he elected to proceed alone. Nevertheless, he apparently had his case better in hand than did the attorneys for the condemned defendants in *Brown v. Allen.*②

In *Sunal v. Large*, 332 U. S. 174, *supra*, the petitioner had been convicted under the Selective Training and Service Act of 1940. He did not take an appeal from his judgment of conviction because it appeared under existing law to be futile. Thereafter, certain cases were decided which afforded a defense to the charge, and the petitioner sought habeas corpus from the district court. The writ was denied, and this court affirmed. Since this case involved the federal courts, and since it does not appear that a clear constitutional question was presented, it is not directly in point, but its *rationale* is valuable and supports the position taken in *Griffin v. Illinois*, by Mr. Justice Frankfurter, concerning the prospective application of that case. It also holds

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①The court below rendered no opinion upon the denial of petitioner's application for habeas corpus. Consequently, this Court cannot assume that it would treat habeas corpus as permissible. This Court is without jurisdiction where the existence of an adequate state ground is debatable. See *Bachtel v. Wilson*, 204 U. S. 36, Annotation 100 L. ed. 1200.

②It is significant that in *Brown v. Allen*, the *trial judge* struck the appeal as out of time. Apparently, this action precluded an appeal to the state supreme court. It would appear that the judge's act was discretionary. See 344 U. S., pages 484-485.

directly upon the inviolability, absent direct attack, of a judgment that was valid when rendered. In that case, the court said (332 U. S., pages 178, 181-182, 183-184):

> "* * * The argument is that since the state of the law made the appeals seem futile, it would be unfair to those registrants to conclude them by their failure to appeal." (p. 178)
>
> "* * * Of course, if Sunal and Kulick had pursued the appellate course and failed, their cases would be quite different. But since they chose not to pursue the remedy which they had, we do not think they should now be allowed to justify their failure by saying they deemed any appeal futile.
>
> "We are dealing here with a problem which has radiations far beyond the present cases. The courts which tried the defendants had jurisdiction over their persons and over the offense. They committed an error of law in excluding the defense which was tendered. That error did not go to the jurisdiction of the trial court. Congress, moreover, has provided a regular, orderly method for correction of all such errors by granting an appeal to the Circuit Court of Appeals and by vesting us with certiorari jurisdiction. It is not uncommon after a trial is ended and the time for appeal has passed to discover that a shift in the law or the impact of a new decision has given increased relevance to a point made at the trial but not pursued on appeal. Cf. *Warring v. Colpoys*, *supra*. If in such circumstances, *habeas corpus* could be used to correct the error, the writ would become a delayed motion for a new trial, renewed from time to time as the legal climate changed. Error which was not deemed sufficiently adequate to warrant an appeal would acquire new implica-

tions. Every error is potentially reversible error; and many rulings of the trial court spell the difference between conviction and acquittal. If defendants who accept the judgment of conviction and do not appeal can later renew their attack on the judgment by *habeas corpus, litigation in these criminal cases will be interminable.* Wise judicial administration of the federal courts counsels against such course, at least where the error does not trench on any constitutional rights of defendants nor involve the jurisdiction of the trial court." (pp. 181-182)

"* * * These registrants had available a method of obtaining the right to defend their prosecutions under § 11 on that ground. *They did not use it. And since we find no exceptional circumstances which excuse their failure, habeas corpus may not now be used as a substitute.*" (pp. 183-184) (Emphasis supplied.)

The rule for which we contend has been favorably discussed as follows (Note, 61 Harvard Law Review 657, 666, 1947-1948):

"'Exhaustion' may, however, connote a more extreme requirement than that of no other presently available remedy. * * * There are Court indications that 'exhaustion' has the extreme meaning here suggested. In the *Sunal* case, the Court discussion of 'exceptional circumstances' indicated that its normal exhaustion rule would not permit federal habeas corpus where appeal had not been sought, *though appeal was no longer available.*" (Emphasis supplied.)

The social implications of a retroactive application of *Griffin v. Illinois* are most serious. In the Tenth Amendment to the Constitution of the United States, the states have reserved the undelegated

powers. The right to protect its citizens against violence and crime is inherent in this reservation. The federal government does not have the power to aid in the maintenance of law and order (except possibly in circumstances not relevant here). The release of countless convicted prisoners for the reason that a free transcript was not available at the time of their conviction seems unnecessary to the just administration of criminal law, especially in a country where criminal appeals were not allowed in federal courts for one hundred years.

It seems evident, however, that failure to seek certiorari here in direct attack upon the 1935 judgment precludes habeas corpus now. This, of course, the petitioner could have done. He has demonstrated his ability by doing so *pro se* in this proceeding. (See Petition for Writ on file herein.)

The Decision in Griffin v. Illinois Should Be Reconsidered

This case seems to follow directly upon *Griffin v. Illinois*, 351 U. S. 12, *supra*. Our research has disclosed no intervening case out of any state. Its impact upon the administration of criminal justice within the states can be severe. Consequently, and since that case was decided by a divided court with four justices dissenting, we ask the court to reconsider that decision.

The decision seems to have rested upon four principal hypotheses: (a) There is no distinction between the requirement of a fee at the trial, and

the requirement of costs on appeal; (b) expense of a transcript, though reasonably necessary to the presentation of appellant's case, is a cost imposed by the state; (c) to require such payment of an indigent appellant is shocking to the universal sense of justice; and (d) destitute appellants must be afforded as adequate appellate review as those who are able to pay for transcripts (351 U. S., page 19).

The validity of the judgment of a court of competent jurisdiction is invariably presumed. *Darr v. Burford*, 339 U. S. 200, 218; *Ventress et al. v. Smith*, 10 Pet. (U. S.) 161, 9 L. ed. 382; *Bechtel v. U. S.*, 101 U. S. 597; see also generally, 3 Am. Jur., Appeal and Error, §§ 924, 925. Every appellant must overcome the presumption of regularity in order to secure a reversal of a judgment. 3 Am. Jur., Appeal and Error, § 925, *supra*. He bears the affirmative burden of showing error, *by the record which he presents to the appellate court*. 3 Am. Jur., Appeal and Error, § 925, *supra*, notes 4 and 5. As a matter of fact, the appeal is a new action commenced by the defendant.

We submit that the presentation of a satisfactory account of the proceedings below is nothing but the preparation and presentation of his case for review. He is obliged to meet this burden at the trial. There is no Anglo-American tradition requiring the state to bear the expense of preparation for trial *even though the trial is to culminate in the adjudication of guilt or innocence*, something which never happens

upon appeal. This expense can be substantial and crucial. At times, the services of a professional investigator are necessary in order to meet the state's evidence, or witnesses must be brought from far off, or the defendant must advance sums to defray the expense of counsel in the interviewing of witnesses and the securing of demonstrative evidence. The fact that the Anglo-American tradition has never required the state to defray such expenses would seem a sufficient answer to any claim that due process required it to do so now. *Betts v. Brady*, 316 U. S. 455. And this seems an equal answer to petitioner's claim upon public funds with which to defray the expenses of presenting his case for review.

Thus, we must distinguish between an exorbitant filing fee on the one hand, and the expense incident to presentation of one's case, on the other. The first, is a tax so to speak upon the right to use the court. It affirmatively denies equal availability of judicial review. An onerous and unreasonable requirement of a transcript might fall into this category. But the fact that the cost of presentation may exceed the amount of a fee which itself would be exorbitant, is not material.

Reference to the Fourteenth Amendment seems clearly to confirm this argument:

> "* * * No state shall * * * *deprive* any person of * * * liberty * * * without due process of law; nor *deny* to any person * * * the equal protection of the laws." (Emphasis supplied.)

This must be construed in accordance with the sense of the people concerning the elements of fairness at the time it was adopted. *Betts v. Brady*, 316 U. S. 455. There is no claim that *in forma pauperis* appeals were established anywhere, contemporaneously with the right of appeal. (See dissenting opinion of Mr. Justice Harlan in *Griffin v. Illinois*, 351 U. S. 12, 38.) At the time of the decision in *Griffin v. Illinois*, it appears that some nineteen states had made no provision for free transcripts. (See ibid., 351 U. S., page 33.) Failure to make such provision can hardly be shocking to the universal sense of justice, under these circumstances. *Betts v. Brady*, 316 U. S. 455, *supra*.

If an indigent is entitled to the same adequacy of review as one able to buy a transcript, then sorry indeed is the plight of those who are able to pay, but who find the total cost of appeal beyond their reasonable means. The cost of transcripts, briefs and counsel may be staggering to a man who is nevertheless unable to take a pauper's oath. The chance of success may not warrant the burden on his limited means. Is he entitled to less consideration than the pauper? We submit it is impossible to equalize the position of defendants before the bar of justice. The state has done its duty when it imposes no barrier.

We respectfully submit that the decision in *Griffin v. Illinois* should be reconsidered, and limited to cases where the state imposes an unreasonable requirement for perfecting an appeal.

The Laws of the State of Washington Provide Full Appeal Without a Stenographic Transcript of the Evidence; in Perfecting Such an Appeal Petitioner Was Not Entitled to Financial Assistance or to Unsolicited Judicial Direction.

Griffin v. Illinois requires nothing, except the purchase of a stenographic transcript on behalf of an indigent defendant, and this, only where necessary to perfection of the appeal under applicable state law.

It was assumed by the court for purpose of the decision that the petitioners could not have secured an appellate review in the State of Illinois without a stenographic transcript of the evidence. *Griffin v. Illinois*, 351 U. S. 12, 16. Counsel for both sides acquiesced in this assumption. In adopting this assumption as a basis for decision, the majority stated (351 U. S. page 16):

> "Counsel for Illinois concedes that these petitioners needed a transcript in order to get adequate appellate review of their alleged trial errors. There is no contention that petitioners were dilatory in their efforts to get appellate review, or that the Illinois Supreme Court denied review on the ground that the allegations of trial error were insufficient. We *must therefore assume for purposes of this decision* that errors were committed in the trial which would merit reversal, but that the petitioners *could not get appellate review of those errors solely because they were too poor to buy a stenographic transcript.* * * * " (Emphasis supplied.)

The majority then held that if a stenographic transcript should prove unnecessary to the perfection of

the appeal upon remand, the state would *not* have to purchase one. *Griffin v. Illinois*, 351 U. S. 12, 20. *There is not one word in the opinion to require the State of Illinois, or any other state, to pay the cost of anything except a stenographic transcript; and this only if necessary to the appeal.*

In this connection, the court said (351 U. S. 12, 20):

> "* * * We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in some cases. The Illinois Supreme Court appears to have broad power to promulgate rules of procedure and appellate practice. We are confident that the State will provide corrective rules to meet the problem which this case lays bare."

A stenographic transcript of the record has never been required in order to perfect an appeal in the State of Washington, pursuant either to rule of court, statute or constitution. *State ex rel. Roberts v. Clifford*, 55 Wash. 440, 443, 104 Pac. 631 (1909); *State ex rel. Hofstetter v. Sheeks*, 63 Wash. 408, 410, 115 Pac. 859 (1911); *Mattocks v. Great Northern Railway Co.*, 94 Wash. 44, 50, 162 Pac. 19 (1916); *State v. Evans*, 145 Wash. 4, 18, 258 Pac. 845 (1927); *State ex rel. Larpenteur v. Superior Court*, 183 Wash. 252, 255, 48 P. (2d) 205 (1935); *Livermore v. North-*

west Airlines, 6 Wn. (2d) 1, 106 P. (2d) 578; *Palin v. General Construction Company*, 45 Wn. (2d) 721, 277 P. (2d) 703; *In re Grady v. Schneckloth*, 150 Wash. Dec. 806, 314 P. (2d) 930.

These cases establish an unbroken line of authority.

In *State ex rel. Hofstetter v. Sheeks*, 63 Wash. 408, 115 Pac. 859 (1911), *supra*, the relator filed an incomplete narrative statement of facts. The respondent moved to strike it, and to substitute the notes of the reporter. The court held that if the statement were incomplete, it should be corrected, but that a transcript of the minutes could not be required. The court said (63 Wash., page 410):

> "The practice of bringing a narrative statement of the testimony to this court *is to be encouraged*. The statement in the affidavit filed on behalf of the respondent, that more than one hundred pages of the record have been *reduced to four pages*, does not to our minds indicate that it does not contain all the material facts testified to by the witness. * * * for our experience has taught us that the * * * reiterations of the trial are not always essential to give this court a proper understanding of the facts. * * * In whatever form proposed, *the burden is on the appellant to furnish a statement of the testimony* sufficient to show this court the facts upon which the assignments of error are predicated and to give this court a full understanding of the case. * * *" (Emphasis supplied.)

In *Mattocks v. Great Northern Railway Co.*, 94 Wash. 44, 162 Pac. 19 (1916), the appellant filed a

statement of facts based, at least in part, upon the notes of a private stenographer. The respondent moved to strike, upon the ground the appellant ought to have used the notes of the official reporter. The court denied the motion and said (94 Wash., page 50):

> "* * * There is nothing in either this statute or the statute to which the plaintiffs refer which requires that the statement shall be made up from the notes of the official court reporter, or from notes of a reporter at all. Indeed, the appellant may make up the statement from *his own notes* or from *any source* and may have it certified, so long as it correctly states the testimony given at the trial of the cause. The notes of the official stenographer may furnish a convenient reference as to what the actual testimony was should the parties disagree, but such are nowhere made the only permissible official record, * * * The motion is denied." (Emphasis supplied.)

In *State v. Evans*, 145 Wash. 4, 258 Pac. 845 (1927), the official reporter died before he was able to transcribe his notes. The parties prepared a narrative statement of facts from the notes of counsel and the recollection of the trial judge. The appellant then asked for a new trial upon the grounds the statement was not a transcript of the reporter's notes and so not complete as to the evidence. Answering this, the court said (145 Wash., page 18):

> "* * * It is a less convenient method to make a statement of facts in this manner than it is to make it from a transcript of the court reporter's notes, but there is no reason why any of the substantial rights of the appellant should

be denied by it. In this instance, we are pe
suaded that they were not. The record contai
a substantial outline of the testimony, and th
court has certified that it contains all of th
material facts, matters and proceedings occu
ring in the trial and not already a part of th
record therein. The appellant is not entitled
more."

In *State ex rel. Larpenteur v. Superior Cour*
183 Wash. 252, 48 P. (2d) 205 (1935), appellant wa
financially unable to pay the cost of a transcript. H
therefore prepared a narrative bill. The reporte
testified that some of the exceptions noted in th
narrative bill did not conform to his notes. Th
court therefore refused to settle the statement, an
the appellant sought a writ of mandate. The cou
granted the writ, ordered the lower court to dete
mine the true nature of the record and to certify
accordingly, and said (183 Wash., page 255):

"A party applying for settlement of a stat
ment of facts cannot be compelled to embod
therein a transcript of the reporters' notes take
on the trial. * * *"

The rule was confirmed in *Livermore v. North*
west Airlines, 6 Wn. (2d) 1, 106 P. (2d) 578, an
Palin v. General Construction Company, 45 Wn. (2d
721, 277 P. (2d) 703 (1954). In the latter cas
the respondent objected to the appellant's statemer
of facts upon the ground it was not a complete recor
in that it did not report the arguments, colloquy, an
proceedings with reference to presentation of th
findings and conclusions and the motion for a ne
trial. Respondent argued that inclusion of tho

items might cast light upon some assignment of error. To this, the court said (45 Wn. (2d) page 726):

> "* * * This argument, carried to its logical conclusion, would require that everything an appellant or his counsel said in court from the beginning of the litigation to the entry of the judgment, including all post-trial motions, be made part of the statement of facts. *A party is not required to embody in his proposed statement of facts a transcript of the reporter's notes taken on the trial.* If there are such statements or admissions in the record which should be included in the proposed statement of facts, it should be possible to point them out with some degree of particularity. * * *" (Emphasis supplied.)

The rule has been recently confirmed in *Grady v. Schneckloth*, 150 Wash. Dec. 806, 314 P. (2d) 930, rehearing denied February 28, 1958. In that case, the petitioner had been previously convicted of the crime of robbery. Upon appeal from his conviction, he had mailed a narrative statement of facts to the Chief Justice of the Supreme Court of the State of Washington. The Chief Justice returned it, advising the petitioner that it was inadequate because it had not been served upon opposing counsel, filed in the trial court, nor certified by the judge. This narrative statement was abandoned. It appears the petitioner then applied to the trial court for a transcript of the reporter's notes, pursuant to RCW 2.32.240 (derived from Rem. Rev. Stat. § 42-5, quoted Br. 57), which provides for such a transcript at public expense if in the opinion of the presiding judge it will promote justice. The request was

denied, and the petitioner abandoned his appeal. Denying his application for a writ of habeas corpus, the court said (314 P. (2d) page 932):

> "There was no impediment to the perfection of petitioner's appeal, but he voluntarily abandoned it. *Instead of serving and filing his proposed narrative statement of facts* so that it might be certified and thereafter used by him in his then pending appeal, petitioner applied to the trial judge under RCW 2.32.240, for a complete statement of facts as a pauper." (Emphasis supplied.)

Distinguishing *Griffin v. Illinois*, 351 U. S. 12, on account of the assumption of the necessity of a transcript in Illinois, the court said, 314 P. (2d) page 933):

> "Moreover, an appeal can be taken without a complete record under Rule on Appeal 34 (3), 34A Wn. (2d) 36, by filing a concise statement of the point or points on which appellant intends to rely. *The statement of facts then needs only be a narrative of so much of the evidence as may be necessary to consider the points specified.*
>
> " * * *
>
> "A stenographic transcript of the reporter's notes of the evidence taken at the trial is unnecessary in any case, civil or criminal. Thus the very basis of the *Griffin* case is completely and entirely absent. A narrative statement satisfies every requirement in that decision, and, moreover, if an appellant specifies the point or points which he desires to present on appeal, he may go up on a short record which *also may be in narrative form.* * * * " (Emphasis supplied.)

The court went on to observe that if a complete

record should be required, the law authorizes the trial court to furnish it upon showing of sufficient reason. This is dictum, which must be read in the light of previous decisions and of the rest of the opinion. The plain fact is that a stenographic transcript is *never required*. In this connection, the court said plainly (314 P. (2d) page 934):

> "*Livermore v. Northwest Airlines*, 6 Wn. (2d) 1, 106 P. (2d) 578, is a complete exposition of the procedural law respecting a statement of facts. We there said specifically, 'A party applying for a settlement of a statement of facts cannot be compelled to furnish a transcript of the reporter's notes.' We further said, 'The statement of facts may be narrative form, and *need not be in the form of a verbatim reproduction* of all that transpired during the trial of the cause.' In *Palin v. General Constr. Co.*, 45 Wn. (2d) 721, 277 P. (2d) 703, the court again reiterated the statement in the *Livermore* case, '*A party is not required to embody in his proposed statement of facts a transcript of the reporter's notes taken on the trial.*'" (Emphasis supplied.)

Since the services of court reporters generally cost less than the services of counsel, it is often expedient to use the reporter's notes rather than a narrative account. It may not ordinarily occur to a litigant to keep notes on the trial for use in a narrative bill, but he can certainly do so. The length of the trial is no obstacle to this. See *State ex rel. Hofstetter v. Sheeks*, 63 Wash. 408, 115 Pac. 859 (1911), *supra* (where one hundred pages of testimony were narrated in four pages). He can then prepare his own statement.

However, a man of means may estimate the cost of appeal and decide the prospects of success do not warrant it. Likewise, the indigent defendant may contemplate the effort and arrive at a similar conclusion. This apparently happened in *State ex rel. Grady v. Schneckloth*, 150 Wash. Dec. 806, 314 P. (2d) 930, *supra*, where the narrative statement disappeared after the Chief Justice suggested the correction of some irregularities. Surely, the petitioner is not entitled to the substitution of public funds for the effort otherwise required of him.

The provision of statute which allows the presiding judge to order a transcript at public expense if he thinks justice will be promoted (Rem. Rev. Stat., § 42-5; Br. 57) does not aid the petitioner's case (cf. Br. 14, 35). If *Griffin v. Illinois* had required a free transcript upon every appeal, the statute would be a superfluity. But since a narrative statement will suffice upon every Washington appeal, the denial of petitioner's request did not preclude his appeal. Therefore, it impeded no substantial right (cf. Br. 14, 35). A favorable disposition of his request would, of course, have spared him some effort, but he has no constitutional right to demand such a benefit.

Moreover, the exercise of the judge's discretion is reviewable. *Grady v. Schneckloth*, 150 Wash. Dec. 806, 314 P. (2d) 930, *supra; State ex rel. Bird v. Superior Court*, 30 Wn. (2d) 110, 190 P. (2d) 762 (1948); *In re Mason v. Cranor*, 42 Wn. (2d)

610, 257 P. (2d) 211. If *Griffin v. Illinois* is to stand as the law, any decision of the highest state court declining to order up the transcript can be reviewed here on *certiorari*. As this court stated in *Griffin v. Illinois*, the state may protect itself against frivolous demands.

Finally, however, if the foregoing statute were unconstitutional as vesting a discriminatory power in the judge, we do not see how the petitioner could take advantage of that fact. He is either entitled to a transcript or not, under the holding of *Griffin* as applied to the law of this state. The existence of an unconstitutional statute could not help him.③

Petitioner Was Not Entitled to Counsel Upon Appeal

This issue was not raised in our supreme court, nor was the question suggested either in the jurisdiction statement or the petition for certiorari. Therefore, it should be disregarded in this court. Rules of Supreme Court 40(2). Moreover, the issue is academic here. This petitioner discharged the two court-appointed attorneys after they had argued his motion for a new trial (R. 71, 77), and asserted that he wanted to appeal in his own behalf (R. 67, 69.). He asked for no assistance. In *Betts v. Brady*, 316 U. S. 455, 86 L. ed. 1595 (1942), *supra*, this court held that an intelligent defendant can waive

③ (And see *Brown v. Allen*, 344 U. S. 443, 484-485, *supra*, a death case where the trial court apparently had discretion to declare the appeal out of time where the statement was filed *one day late*.)

the right to counsel *at the trial.* And even in the federal courts, a petitioner is bound by a competent and intelligent waiver. *Johnson v. Zerbst*, 304 U. S. 458, 469. Assuming without conceding, the state were obligated to furnish counsel on appeal where requested, the petitioner has forfeited all such claim (R. 67, 69, 71, 77). The petition for writ of habeas corpus and the letters and affidavits in the record demonstrate this petitioner's ability (R. 6, *et seq.*). See *Betts v. Brady*, 316 U. S. 455, 86 L. ed. 1595 (1942), *supra; Johnson v. Zerbst*, 304 U. S. 458, *supra.*

This case therefore does not reach the question whether the state must furnish counsel under different circumstances. Suffice it to say that we know of no case so holding, and petitioner cites none. Representation is required in the federal courts, but on a basis not referable to the states. *Johnson v. United States*, 352 U. S. 565, 1 L. ed. (2d) 593; *Farley v. United States*, 354 U. S. 521, 1 L. ed. (2d) 1529 (1957).

However, we should note that petitioner overemphasizes the difficulties of presenting an appeal to the Supreme Court of the State of Washington. A narrative statement of facts may be concise. The abstract of record (no longer required) was not required of petitioner if his statement did not exceed one hundred pages. (Rule VI, 1 Rem. Rev. Stat. p. 139, 159 Wash. xxxv, set out in full at page 60, *et seq.* of appellant's brief.)

CONCLUSION

In conclusion, we submit that *Griffin v. Illinois* should be reconsidered and limited to cases, should any arise, where the states impose an unreasonable requirement as a prerequisite to appeal. At all events, *Griffin v. Illinois* should not be retroactively applied except as to a petitioner who had raised the point in a direct attack upon his conviction and had carried that attack to this court. In this case, the petitioner filed his own notice of appeal and prepared his own application for writ of mandate to direct the trial court to furnish him with a free transcript of the testimony. He was equally able to prepare an application for certiorari out of this court and failed to do so. The social consequences of a retroactive application of the *Griffin* decision would be serious. The limitation we propose is therefore strongly indicated.

The decision in *Griffin v. Illinois* requires no more than the purchase of a transcript for a defendant who must have it as a prerequisite to appeal. Such a transcript is not required in Washington and was not necessary to the perfection of petitioner's appeal in 1936.

Petitioner has waived his right to counsel. However, the history and nature of appellate procedure are such that the states are not obligated to furnish counsel on appeals to their courts.

We respectfully request that the order of the Supreme Court of the State of Washington denying petitioner's request for a writ of habeas corpus be affirmed.

Respectfully submitted,

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